

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



76-1002 B  
FAS

To be argued by  
FREDERICK P. HAFETZ

In The  
**United States Court of Appeals**  
For The Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

- against -

ROBERTA WADDELL,

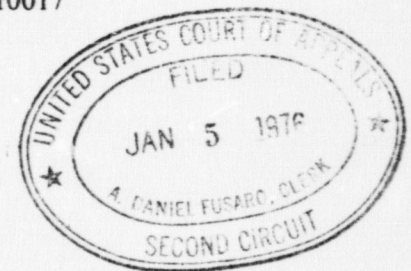
*Defendant-Appellant.*

*On Appeal from the United States District Court for the Eastern  
District of New York*

**BRIEF FOR DEFENDANT-APPELLANT**

GOLDMAN & HAFETZ  
*Attorneys for Defendant-Appellant*  
60 East 42nd Street  
New York, New York 10017  
(212) MU 2-8337

LAWRENCE S. GOLDMAN  
FREDERICK P. HAFETZ  
*Of Counsel*



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERTA WADDELL,

Appellant.  
-----x

BRIEF ON BEHALF OF DEFENDANT-APPELLANT  
ROBERTA WADDELL

ON APPEAL FROM AN ORDER AND JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

This appeal is from an order of the United States District Court for the Eastern District of New York (Hon. John F. Dooling, Jr.) entered on September 15, 1975, denying the defendant's motion for resentencing.

The defendant was convicted by plea of guilty to conspiracy to import into the United States, to distribute and to possess with intent to distribute cocaine, and to conceal the existence of this conspiracy. [21 U.S.C. 841(a)(1), 846, 952(a), 960(a)(1) and 963].

On May 9, 1975 the defendant was sentenced to a

prison term of five years under 18 U.S.C. 4208(a)(2). On August 8, 1975 she submitted a motion for reduction of sentence, Fed.R.Cr.Pro. 35. On September 15, 1975 her motion was denied and she was resentenced to a prison term of five years pursuant to 18 U.S.C. 4208(a)(2) and to an additional special parole term of three years.

The defendant, in her appeal, asks the Court to remand the case to the District Court for resentencing before a different judge from the judge who sentenced her.

#### INTRODUCTION

The defendant, Roberta Waddell, appeals from a judgment and order denying her motion for reduction of sentence, and sentencing her to a prison term of five years under 18 U.S.C. §4208(a)(2) and an additional special parole term of three years. Her sentence resulted from her plea of guilty to conspiracy to import and distribute cocaine.

Prior to her arrest the defendant, a 40 year old woman, had no criminal record. During the almost two years between her arrest and sentence, she had rehabilitated herself and established herself in a responsible business position. She is the sole living parent of two daughters, age 17 and 12, whose father had died in 1974 of a heart attack. In addition, she cooperated fully and frankly with the Government, and her cooperation was responsible for the indictment of her co-defendant, Armando Margulis.

## STATEMENT OF FACTS

### 1. The Proceedings

The defendant, on August 1, 1973, was intercepted at a routine customs inspection at Kennedy Airport. She was returning to the United States by plane from Buenos Aires. In two false bottom suitcases she was carrying were found 13.2 pounds of cocaine.

The defendant was subsequently indicted in the United States District Court for the Eastern District of New York in a two-count indictment for conspiracy to import and distribute cocaine, and the importation of cocaine.

During the pendency of the indictment the defendant fully cooperated with the Government. She testified in the Grand Jury and her testimony resulted in the indictment of Armando Margulis, who is still a fugitive.

On March 14, 1975 the defendant pleaded guilty before the Hon. John F. Dooling, Jr. to the first count of the indictment charging her with conspiracy.

On May 9, 1975 the defendant was sentenced by Judge Dooling to a term of imprisonment of five years under 18 U.S.C. §4208(a).

On August 8, 1975 the defendant submitted a Rule 35 motion for reduction of sentence. That motion was argued before Judge Dooling on August 21, 1975. Also on that date, the second count of the indictment was dismissed on the application of the Government.

On September 15, 1975 Judge Dooling denied the Rule 35 motion and resentenced the defendant again to a term of imprisonment of five years, and added a special parole term of three years.

This appeal is directed to the final judgment of September 15, 1975 but will discuss the three sentencing hearings as they are part of the entire sentencing process in this case.

## 2. The Sentencing Proceedings

### A. The Initial Sentence.

On May 9, 1975 the Court sentenced the defendant to a prison term of five years.

Prior to the sentence, defense counsel complained about a major error in the probation report (S4\*, A22). The report, in its evaluative summary, had made the defendant out to be the major participant in the conspiracy with Margulis (PR 24-5)\*\*. It reached this conclusion although the defendant claimed that she was manipulated by Margulis (PR 9-10), a belief concurred in by the government agents (PR 8) and by others who sent in letters

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\* "S" refers to the minutes of the original sentence hearing on May 9, 1975. "A" refers to the appendix to this appeal.

\*\* "PR" refers to the Probation Report. Although counsel for appellant was permitted to examine the report, the rules concerning the secrecy of probation reports preclude appellant from including it in the record on appeal or appendix. We do ask this Court to requisition it and the entire probation file.

to the Court \*, and apparently not contested by anyone.

The Assistant United States Attorney then brought to the attention of the Court (S6, A24) the defendant's cooperation.

The Court characterized the sentence as "an impossibly difficult sentence". (S9, A27) He said, in part,

"... I am sworn into the system of law that the Constitution has established for us.

I have sentenced, and never without pain, many people to prison on drug charges.

Do you know that we have to sentence to prison creatures from Colombia who come up with one kilo of cocaine in their girdles, tied around their waists, who have been paid \$500 to come to this country with that cocaine. And that is more money than they have ever seen in their lives before.... (S9-10, A27-8).

\* \* \*

As you must see and as you must explain to your children, I have no other alternative but to sentence you to prison. I cannot put you on probation. It would be violating the temples of justice to do it. (S10, A28).

\* \* \*

I have no other alternative but this, It would be wonderful for me if I could put everyone on probation. Maybe in some bright future there will be better ways of handling these things, more compassionate ways, more sensitive ways. But, God help us, we know no better way to do it. I don't know a better way...." (S11, A29).

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\* These letters are in the Probation Department file. The writers are Dr. Dalton, Messrs. Coleman, Heller, Waddell and West.

Thereupon, the Court sentenced the defendant to a prison term of 5 years pursuant to 18 U.S.C. §4208(a)(2), under which, he said, "the Board of Parole has the power to release you immediately or as soon as possible" (S12, A30).

B. The Motion for Resentence

On August 8, 1975 defense counsel brought a Rule 35 motion for resentence\*. In the motion, he reiterated the important and fruitful cooperation she gave to the government (MR2\*\*, A35). In addition, he again criticized the significant errors in the probation report. As most important, he cited the following erroneous statement in the report:

"While codefendant Margulis was undoubtedly part of her life during the period of the offense, her extremely active participation in all phases of the smuggling and sale of the drugs by her own admission makes Margulis a secondary participant." (MR3, A36).

Counsel again brought to the Court's attention that the defendant had been gainfully and importantly employed and was considered a valued worker by her employer (MR2, A35)\*\*\*.

Moreover, counsel pointed out that the imposition of an "(a)(2)" sentence was meaningless, citing the then recently-

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\* This motion is included in the appendix, pages A33-40.

\*\* "MR" refers to the motion for reduction of sentence.

\*\*\* The full letter from the defendant's employer, Mr. Antonoff, is in the Probation Department file. It further states that Mr. Antonoff has a job waiting for the defendant when she is released.

decided United States v. Slutsky, 514 F.2d 1222, 1230 (2 Cir. 1975) (MP 4-5, A36-7).

On August 21, 1975 the Court heard argument on the defendant's motion. In response to the defense attorney's claim that the (a)(2) sentence was not of much benefit, the Court said:

"I must disagree with that.

It carries a lot of weight with the prison authorities (MH5\*, A45).

\* \* \*

I think we can, with some confidence, expect that things like (a)(2) sentence is well aware of the appropriate effect which it empowers.

I'm sure the parole authorities in this case, to release the person who is imprisoned can release her literally at any time" (MH7, A47).

The Court also downgraded the importance of the defendant's cooperation, stating:

"... [W]e have cooperation cases that you know the entire system of the administration of criminal justice depends on and pleas also. Most sentences far and away are sentences rooted in cooperation" (MH 10, A50).

At the hearing on the motion, the Assistant United States Attorney, quoting the attorney assigned to the case, contradicted the Probation Report's description of Margulis as a secondary figure in the conspiracy:

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\* "MH" refers to the August 21, 1975 hearing on t motion.

"According to Mr. DePetris, Mr. Margolis was the man who was the connection and the distributor and chief of the network in this matter and apparently Mrs. Waddell was giving money for the importation of cocaine.

According to Mr. DePetris, Margolis talked Mrs. Waddell into giving money to him to finance the importation of cocaine.

She kept the books of the transactions and assisted in the importation itself.

However, it is in the opinion of the office of the United States Attorney that Mr. Margolis is the more culpable\* party in this matter."

The Court replied, "I have assumed as much" (MH13-4, A53-4).

The Court reserved decision on the Rule 35 motion, then set down the motion for further argument on September 15, 1975.

On that date the Court resented the defendant. The purpose of the resentence was to include the mandatory special parole term, which the Court inadvertently failed to include on the sentencing date. Counsel again argued for a reduced sentence pursuant to his Rule 35 motion, citing the August 21 statement of the United States Attorney, in which the prosecutor recited the extent of the defendant's cooperation. The Court replied:

"You see, it works both ways. Ordinarily we pay no attention to them when they say that and sometimes we do.

When they say this is a La Mafia connection offense and the defendant should be sent away for

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\* "culpable" is apparently erroneously transcribed in the minutes as "capable".

the maximum, we pay no attention.

So here we do recognize exactly what has been said and I can only say that has been taken into account." (R7-8,\* A68-9).

The Court then sentenced the defendant to a prison term of five years and an additional special parole term of three years.

### 3. The Probation Report(s)

On the date the defendant pleaded guilty, the Court told her that the sentence "depends entirely on the sentencing judge and it is very largely determined by what is contained in the pre-sentencing report prepared by the Probation Office" (P9\*\*, A11).

Subsequently, the Probation Department submitted a 26 page pre-sentence report to the Court. The report, upon which the Court relied in the May 9, 1975 sentencing, contained numerous errors. For instance, it claimed that the defendant delivered drugs to California (PR7, 9, MR3, A35); it characterized her involvement in a legitimate motion picture promotion as a "scheme" (PR3, MR4, A36); it misquoted her step-brother (PR14). The report also conveyed a false impression of wealth in her childhood (PR11, MR4, A36) and, more important, at the time of sentence, by overstating the amount of social security she

\* "R" refers to the minutes of the resentencing on September 15, 1975.

\*\* "P" refers to the minutes of defendant's plea of guilty on March 14, 1975.

received (PR23, MR4, A37), exaggerating the value of her car (PR23-4, MR4, A37) and falsely claiming she owned a home (PR23-4, MR4, A37).

Far more significant than these inaccuracies was the claim that the defendant was the principal party in the conspiracy with Margulis. The report stated, in its evaluative summary:

"She [the defendant] claims to have been under the influence of co-defendant Margulis to the extent that she would do almost anything he suggested. Her contention is that he befriended her when she was most vulnerable and maleable during the months which proceeded the breakup of her marriage. While co-defendant Margulis was undoubtedly part of her life during the period of the offense her extremely active participation in all phases of the smuggling and sale of the drugs, by her own admissions, makes Margulis a secondary participant. While the defendant makes Margulis out to be the real villain in this scheme, her extremely active involvement strains the validity of such a conclusion." (PR 24-5).

The defendant had told the Probation Department that she met Margulis at a time when she was vulnerable because of the recent break-up of her marriage of 17 years. Under his sway, she supplied funds and made two trips to South America to import cocaine. Margulis was, in short, as characterized by her counsel, her "Svengali". (MS4, A22).

As noted earlier (see page 4, infra), the defendant's version of her relationship was backed up by the Drug Enforcement Administration agents assigned to her case. According to the Probation Report, "The agents described the defendant as an apparently naive woman who was a perfect target for the very deceitful and manipulative co-defendant Margulis" (PR8). More-

over, this version was confirmed in a number of letters sent to the Court in her behalf.\*

And, as also noted earlier (see pages 7,8, infra), at the Rule 35 motion hearing the Assistant United States Attorney also contradicted the account given by the Probation Department, stating that it was his office's opinion that "Mr. Margulis is the more culpable party in this matter" (MH14, A54).

By personal visit and by letters\*\* the defendant and her attorney brought these errors to the attention of the Probation Department. While most of the factual inaccuracies were corrected in the revised probation report, the Department refused to correct the major inaccuracy - that the defendant was the major participant in the conspiracy. That statement remained in the revised report given to the Court.

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\* See f.n.\*, p. 5.

\*\* The correspondence between the defendant, her attorney, Paul C. Rooney, and James C. Haran, Chief Probation Officer of the Eastern District of New York, are, although not part of the record on appeal, included in the appendix (A73-87).

ARGUMENT

POINT I

THE COURT SHOULD CHANGE ITS POLICY OF  
REFUSING TO REVIEW SENTENCES WITHIN THE  
STATUTORY LIMITS, OR AT THE LEAST, SHOULD  
SET GUIDELINES SUGGESTING A PREFERENCE  
FOR A PROBATIONARY SENTENCE.

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At the outset, the defendant invites this Court to abrogate its long-standing policy of refusing to review sentences which are within the statutory limits. See, e.g. United States v. Goldberg, - F2d - (slip. op. 753, 767, 2nd Cir. 75-1229, decided November 26, 1975). To deny appellate review to what in most cases is clearly as far as the defendant is concerned the most crucial decision the Court makes is, defendant submits, an abdication of an appellate court's supervisory power. Cf. Dorsznski v. United States, 418 U.S. 424, 440-1 (1974).

In the alternative, the defendant requests that the Court in its supervisory power set up guidelines to District Court judges. She respectfully asks that the Court adopt in essence the standards enunciated by the ABA Project of Minimum Standards for Criminal Justice, with its preference for probation. Those standards state:

"A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary." ABA Project on Standards for Criminal Justice, Standards

Relating to Sentencing Alternatives and Procedures, §2.3(c), p. 15.

At least one important court has enunciated a similar policy. In People v. Golden, 41 A.D.2d 242, at 244 (1st Dept. 1973), the Appellate Division for the First Department of the State of New York, which covers Manhattan and the Bronx, stated:

"Generally, it is recognized that there is no advantage to society in sentencing to imprisonment a person with an unblemished background, who has been convicted of a nonviolent crime. Particularly this is so where he has roots in the community such as family ties, or a responsible business position, which render it highly improbable that the defendant will ever again commit an illegal act."

Under any such standard the defendant deserves a probationary sentence. Until her arrest two years prior to sentence, during a period of a great upheaval in her life, she had an unblemished record. Her conviction, while for a serious crime, was for a crime of nonviolence. She is the mother of two young girls, ages 12 and 17, whose father passed away one and one-half years ago. She was making strides in a responsible business position. Moreover, she cooperated fully with the Government investigation of her criminal involvement, and her cooperation resulted in the indictment of her co-defendant.

POINT II

THE COURT'S FAILURE TO EXERCISE ITS  
DISCRETION, AND TO CONSIDER RELEVANT  
FACTORS WITHOUT MISAPPREHENSION IN-  
VALIDATES THE SENTENCING PROCEDURE.

This case is one in which a conscientious and respected judge imposed what he described as "an impossibly difficult sentence." (S9, A27). In imposing this sentence, the defendant contends, the Court erred by failing to exercise its discretion in the selection of a sentencing alternative, not giving proper weight to her cooperation with law enforcement authorities, and sentencing her under a mistaken impression as to the effect of a prison sentence under 18 U.S.C. §4208(a)(2).

First, the Court rejected the choice of a probationary sentence, stating to the defendant that it had "no other alternative but to sentence you to prison." (S10, A28). The Court's statement indicates the "fixed and mechanical approach in imposing sentence" that this Court has criticized. United States v. Schwarz, 500 F.2d 1352 (2 Cir. 1974). See also Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Williams v. New York, 337 U.S. 241, 247-50 (1949); Woosley v. United States, 478 F.2d 139, 146 (8th Cir. 1973) (en banc).

This failure to consider the possibility of a probationary sentence also violated the clear Congressional intent reflected in the Controlled Substances Act of 1970, 21 U.S.C. §801-904. In that act Congress specifically eliminated (with one exception not here relevant) the mandatory prison terms for

narcotics violators that the Narcotics Control Act of 1956, ch. 629, 70 Stat. 567, had required. Bradley v. United States, 410 U.S. 605 (1973). See United States v. Baker, 487 F.2d 360, 363-4 (2 Cir. 1973)(J. Lumbard, dissenting).

Moreover, the Court failed to give the defendant the individualized treatment the law requires, and to fit the punishment to the offender and not the crime. Williams v. New York, supra, at 249; United States v. Hendrix, 505 F.2d 1233, 1236 (2d Cir. 1974); United States v. McCoy, 429 F.2d 739, 743-4 (D.C.Cir. 1970). In a conscientious but erroneous effort to overcome the often-criticized disparity in sentences between defendants of middle-class and ghetto backgrounds, see, e.g. Frankel, Criminal Sentences 42-3, the Court felt constrained not to give the defendant, a Smith College graduate from a middle class background, any preferential treatment because of her history. Compare United States v. Schwarz, supra. He sought to justify her sentence by comparing it to that he felt compelled to impose upon couriers from Colombia:

"Do you know that we have to sentence to prison creatures from Colombia who come up with one kilo of cocaine in their girdles, tied around their waists, who have been paid \$500 to come to this country with that cocaine. And that is more money than they have ever seen in their lives before .... (S9-10, A27-8). (Emphasis added).

By this effort not to show preference, the Court also failed to consider the factors of rehabilitation and reformation - equally critical to deterrence in the imposition of sentence. Williams v. New York, supra at 248; Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1968). Consideration of these

factors would have weighed heavily in favor of the defendant, who in a very real sense had reformed and rehabilitated herself in the almost two years between her crime and her sentence.

Second, the sentencing judge did not give adequate weight to the cooperation that the defendant gave to law enforcement authorities. Shortly after her arrest, the defendant began cooperation with the United States Attorney's office. Her cooperation, and apparently her cooperation alone, resulted in the indictment of her co-defendant Margulis.\*

Although the sentencing judge stated that he had taken into account the defendant's cooperation and had adjusted her sentence accordingly (R7-8, A68-9), the judge disparaged the importance of cooperation. "Most sentences far and away" he said, perhaps inaccurately, "are rooted in cooperation" (MH7, A50).

Furthermore, at the September 15 resentence, the Court stated, in response to defense counsel's plea for reduction based on the Assistant United States Attorney's statement concerning the defendant's cooperation:

"You see, it works both ways. Ordinarily we pay no attention to them when they say that and sometimes we do.

When they say this is a La Mafia connection offense and the defendant should be sent away for

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\* Ironically, the defendant's full and frank cooperation worked to her detriment. The objective facts of her case - the importation of cocaine in two false-bottomed suitcases - made her out to be a mere courier of drugs in a single instance. It was her own cooperation and frankness which made her involvement appear to be a serious one.

the maximum, we pay no attention.

So here we do recognize exactly what has been said and I can only say that has been taken into account." (R7-8, A68-9).

The importance of cooperation extended by accomplices to law enforcement needs no documentation. Particularly in the investigation and prosecution of victimless crimes - such as the sale of narcotics - informants and cooperating persons play an essential role. It is an axiom of the administration of criminal justice that such cooperation must be rewarded. Indeed, this Court has specifically recognized the importance of cooperation as a factor to be considered by the sentencing judge, stating that the cooperation shown by a defendant is "highly material to mitigation of sentence not only because the defendant should be rewarded for his services to the community but also because cooperation with law enforcement is a significant step toward rehabilitation." United States v. Malcolm, 432 F.2d 809, 817 (2nd Cir. 1970).

This was not a case of routine, run-of-the-mill cooperation in which a defendant pleaded guilty and testified against an accomplice. In this case the defendant supplied from scratch the entire case against a major drug trafficker. By doing so, she revealed far more of her own criminal involvement than would have been known otherwise. Such candor here only

served to her detriment (See f.n. \* , p. 16 supra; Point III, infra). At the very least, she deserved serious unambiguous consideration of the extent of her assistance to law enforcement.

Third, The Court sentenced the defendant while under an apparent misapprehension as to effect of a sentence under 18 U.S.C. §4208 (a)(2). The sentence was imposed only a few weeks after this Court's decision in United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975), in which this Court stated (at 1229):

"From the standpoint of an opportunity for early release, the (a)(2) prisoner is in no better position than a prisoner who has received a regular sentence."

At the time of sentence, the sentencing judge apparently expected, as did the District Court judge in Slutsky, that the Parole Board would give serious consideration to an early release of the defendant. Thus, in response to defense counsel's argument that an "(a)(2)" sentence was of little benefit to the defendant, the Court said:

"I must disagree with that.

It carries a lot of weight with the prison authorities (MH5, A45).

\* \* \*

I think we can, with some confidence, expect that things like (a)(2) sentence is well aware of the appropriate effect which it empowers.

I'm sure the parole authorities in this case, to release the person who is imprisoned can release her literally at any time." (MH7, A47) (Emphasis added).

However, as in Slutsky, which also involved a five year prison sentence, in this case the Parole Board guidelines indicate a term of confinement ranging from 26 to 36 months, whereas the sentencing judge seems to have been satisfied to have the Parole Board release the defendant at some time less than the 20 months, or 1/3 of her sentence, that would be the minimum under ordinary circumstances. Since, therefore, the Court's apparent expectation would not accord with the likely Parole Board consideration, the case should be remanded for resentencing. United States v. Slutsky, supra at 1227.

Thus, because of the sentencing judge's failure to consider his discretionary power, to weigh the factors of rehabilitation and reformation, to give adequate consideration to the defendant's cooperation, and his quite reasonable misapprehension as to effect of an (a)(2) sentence, the case should be remanded for resentencing.

## POINT II

### THE SIGNIFICANT AND HIGHLY PREJUDICIAL ERROR IN THE PRE-SENTENCE REPORT UPON WHICH THE COURT RELIED REQUIRES A REMAND FOR RESENTENCING BEFORE A DIFFERENT JUDGE.

In the "evaluative summary" of its pre-sentence report, the Probation Department wrote:

"She [the defendant] claims to have been under the influence of co-defendant Margulis to the extent that she would do almost anything he suggested. Her contention is that he befriended her when she was most vulnerable and maleable during the months which proceeded the breakup of her marriage. While co-defendant Margulis was undoubtedly part of her life during the period of the offense her extremely active participation in all phases of the smuggling and sale of the drugs, by her own admissions, makes Margulis a secondary participant. While the defendant makes Margulis out to be the real villain in this scheme, her extremely active involvement strains the validity of such a conclusion." (PR 24-5).

As portrayed by the defendant and her attorney, at the time of her criminal involvement the defendant was a vulnerable woman in a depression resulting from her recently dissolved marriage of 16 years. While in such a condition she fell under the influence of her co-defendant, the charismatic Armando Margulis. The defendant was, in short, a tool Margulis used in his drug importation scheme. It was he who had the South American contacts, the experience and know-how, and the American customers. It was she who, at his direction, supplied the funds and her own participation. Although admittedly her activities were far from minimal, she was in a real sense a victim of the manipulative Margulis.

The federal drug agents assigned to this case,

probably the people other than the participants most knowledgeable about the case, agreed with Mrs. Waddell's explanation of the cause of her criminal conduct. As related in the Probation Report:

"The agents described the defendant as an apparently naive woman who was a perfect target for the very deceitful and manipulative co-defendant Margulis." (PR8).

The United States Attorney's office also disagreed with the Probation Report's findings. In clear, albeit circumspect terms, at the hearing on the Rule 35 motion, the Assistant United States Attorney said:

"According to Mr. DePetris, Mr. Margolis was the man who was the connection and the distributor and chief of the network in this matter and apparently Mrs. Waddell was giving money for the importation of the cocaine.

According to Mr. DePetris, Margolis talked Mrs. Waddell into giving money to him to finance the importation of cocaine.

She kept the books of the transaction and assisted in the importation itself.

However, it is in the opinion of the office of the United States Attorney that Mr. Margolis is the more culpable party in this matter (MH13-4, A45-6).

Following her reading of the evaluative summary described above, the defendant and her counsel strongly urged the Probation Department, by letter and by personal visit, to revise the contested passage. Despite the views of the agents and the ready accessibility to the United States Attorney\*, who no doubt would

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\* The United States Attorney's office in the Eastern District is in the same building as the Probation Department.

have told the Probation Department essentially what was stated on the Rule 35 hearing, the Probation Department, while acknowledging numerous far less important factual errors, stubbornly clung to this unfair characterization. In a revised resentence report delivered to the sentencing judge prior to his decision on the motion, the Probation Department repeated the contested evaluation verbatim.

Thus, the Court, both at the time of sentencing and of the decision on the Rule 35 motion, had before it a presentence report which in its critical aspect was clearly wrong, according to all the parties involved in this case. Instead of being portrayed in a sense as a victim of the "deceitful" Margulis, the defendant was made out to be the major participant and one who herself had deceived the agents by minimizing her role and had attempted, however unsuccessfully, to deceive the Probation Department and the Court.

This serious and highly prejudicial error in the presentence report, upon which the sentence, was in the words of the sentencing judge, "very largely determined," (P9, A11) mandates a remand for resentencing.

Misinformation about a material fact or material false assumptions as to a fact relevant to sentencing renders the entire sentencing procedure invalid. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Brown, 479 F2d 1170 (2 Cir 1973); United States v. Malcolm, supra.

In this case the judge expressly stated his heavy



reliance on the pre-sentence report. See Williams v. United States, 337 U.S. at 249-50. This major error had an inevitable adverse impact on the judge. Not only did the report exaggerate the defendant's involvement, it challenged the honesty of her statement to the Court. While defense counsel promptly challenged this serious misstatement, as this Court said in the United States v. Manuella, 478 F.2d 440, 442 (2 Cir. 1973), "We may query whether the same mitigating factors would carry the same weight coming from defense counsel ... as they would in a report of the probation department."

Moreover, this warped and highly prejudicial error, no doubt affected the consideration and recommendations of the other members of the Eastern District sentencing panel\*, who were unaware of its contradiction by the United States Attorney. Whatever benefit a defendant receives from the consideration by this "purely advisory" panel, United States v. Driscoll, 496 F.2d 252, 253 (2 Cir. 1974) was clearly diminished by the error.

Although on the date of the decision on the Rule 35 motion, the United States Attorney's office contradicted the probation report and the Court stated that he "had assumed" that, contrary to the pre-sentence report, Margulis was the more culpable, the correction at this late date did not remedy the serious

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\* See Zavatt, Sentencing Procedure in the United States District Court for the Eastern District of New York, 41 F.R.D. 469 (1966), 54 F.R.D. 327 (1968).

prejudice. Although the judge had an opportunity to change his ruling, this Court has recognized the human problem involved. As this Court has said, "It is difficult for a judge, having once made up his mind, to resentence a defendant ..." United States v. Rosner, 485 F.2d 1213 (2nd Cir. 1973), cert. den. 417 U.S. 950 (1974); Mawson v. United States, 463 F.2d 29 (1st Cir 1972). See also United States v. Manuella, supra at 442.

Thus, the serious and highly prejudicial error in the evaluative summary requires a remand for resentencing. And in remanding, this Court should suggest that the resentencing be in front of a different judge from the judge who sentenced the defendant. United States v. Rosner, supra; Mawson v. United States, supra.

#### CONCLUSION

For the reasons stated above, the case should be remanded to the district court for resentencing. Such resentencing should be before a different judge from the judge who imposed the sentence appealed from.

Respectfully submitted,

GOLDMAN & HAFETZ  
Attorneys for Appellant Roberta  
Waddell  
60 E. 42nd Street  
New York, N.Y. 10017

LAWRENCE S. GOLDMAN  
FREDERICK P. HAFETZ  
Of Counsel

UNITED STATES COURT OF APPEALS

UNITED STATES OF AMERICA,  
Appellee,

- against -

ROBERTA WADDELL,  
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

SS.:

I, **James A. Steele** being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
310 W. 146th St., New York, N.Y.

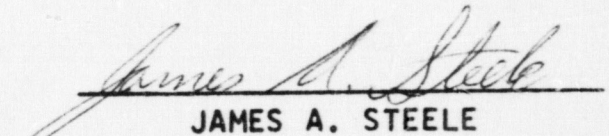
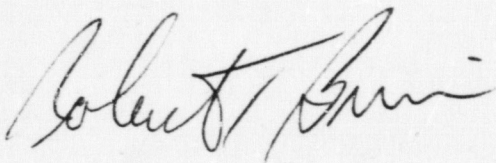
That on the 29th day of Dec. 1975 at 225 Cadman Plaza, Brooklyn, NY

deponent served the annexed *Brief* upon

DAVID G. TRAGER U.S. ATTNY- EAST DIST.

the Attorney in this action by delivering <sup>2</sup> true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein.

Sworn to before me, this 29th  
day of December 1975

  
JAMES A. STEELE

ROBERT T. BRIN  
NOTARY U.S. State of New York  
No. 31 0418950  
Qualified in New York County  
Commission Expires March 30, 1977